Ms Elizabeth Lee

Chair

Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

ACT Legislative Assembly

GPO Box 1020

CANBERRA ACT 2601

Dear Ms Lee

I write in response to comments made by the Standing Committee on Justice and Community Safety (the Committee) in Scrutiny Report 18 of 29 May 2018 in relation to the *Work Health and Safety Amendment Regulation 2018* (the Amendment Regulation).

The Committee has drawn particular attention to the nature of the offences under the Amendment Regulation, being strict liability offences. In particular, the Committee has expressed concern that strict liability offences were not discussed in the human rights discussion of the Explanatory Statement.

I thank the Committee for drawing this matter to the Assembly’s attention and attach a discussion of the strict liability offences for the Committee’s benefit. The attached discussion addresses the human rights elements of the new strict liability offences as a result of adopting chapters 7 and 9 of the nationally agreed model work health and safety laws.

The creation of new strict liability offences is consistent with the way offences are currently dealt with under the Territory’s work health and safety legislation. Specifically, section 6A attaches strict liability to the physical elements of all offences under the *Work Health and Safety Regulation 2011* (WHS Regulation) unless expressly stated otherwise. There are currently no offences under the WHS Regulation that are expressly stated not to be strict liability.

I thank the Committee for its careful consideration of the Bill and trust that the above response and attached information will assist the Committee.

Yours sincerely

Rachel Stephen-Smith MLA

**ATTACHMENT A**

Strict liability offences under the Amendment Regulation

This attachment provides an overview of the human rights which may be engaged by the introduction of new strict liability offences under the *Work Health and Safety Amendment Regulation 2018* (Amendment Regulation), together with a discussion of the reasonableness of any possible limitations.

Section 28(1) of the *Human Rights Act* 2004 (HR Act) provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including the following:

1. the nature of the right affected;
2. the importance of the purpose of the limitation;
3. the nature and extent of the limitation;
4. the relationship between the limitation and its purpose; and
5. any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

***Rights in criminal proceedings (presumption of innocence) – s 22(1)***

Section 22(1) of the HR Act provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

*The nature of the right affected*

The Amendment Regulation introduces strict liability offences in relation to the new chapters 7 and 9 adopted from the national model work health and safety laws. Strict liability offences engage the right to be presumed innocent (s 22(1) of the HR Act) by removing the fault elements of an offence which in turn requires the defendant to prove mistake of fact (a defence to all ACT offences under the *Criminal Code 2002* (the Code)) or other defences available under the Code for strict liability offences. Strict liability can be reasonably justified in certain circumstances:

* strict liability offences should only be used where a person knows, or ought to know, their legal obligations;
* strict liability offences must be relevant, rational and proportionate to their objective;
* examples of where strict liability offences are considered to be appropriate include regulatory regimes such as work health and safety, to support the integrity of the legislation, and where offences are minor with no custodial penalty.

*The importance of the purpose of the limitation*

The purpose of the *Work Health and Safety Act 2011* (WHS Act) is to ensure the health and safety of workers while at work. A necessary role of the WHS Act and supporting legislation is to ensure the effective deterrence of behaviour and minimisation of risks that increase the likelihood of injuries or deaths in the workplace. Accordingly the offences created are regulatory in nature and as such of a type that is considered to be suitable for construction as a strict liability offence.

Hazardous chemicals are substances, mixtures and articles that can pose a significant risk to health and safety if not managed correctly in the workplace. In the workplace they present a health risk, physical risk or both to workers that use or handle them and persons proximate to their use or handling.

Prior to the adoption of chapters 7 and 9 under the Work Health Safety Regulation 2011 (WHS Regulation), hazardous chemicals were regulated as dangerous substances under the *Dangerous Substances Act 2004* (DS Act).

However, the DS Act applied the *Australian Code for the Transport of Dangerous Goods by Road and Rail* (ADG Code) in terms of the classification, labelling and packaging of dangerous substances. In addition, health monitoring for workers was only a requirement under the Codes of Practice that were adopted under the DS Act. This was out of step with the most contemporary work health and safety obligations applied across all the model WHS law jurisdictions and Victoria in terms of the classification and labelling of chemicals.

The adoption of the new chapters into the Territory’s WHS legislation was the final step in the harmonisation of these laws with the nationally agreed model laws. By adopting the new model chapters, the regulation of dangerous substances has now shifted to the WHS legislation and is regulated as hazardous chemicals. In effect, this has streamlined the regulatory approach to health and safety obligations and risks associated with hazardous chemicals into the WHS Act.

In particular, the Amendment Regulation applies specific duties in relation to the management of the risks to health and safety associated with use, handling and storage of hazardous chemicals in the workplace (chapter 7) and at major hazard facilities (chapter 9). These additional duties support the existing primary duty under section 19 of the WHS Act that applies to all persons conducting a business or undertaking (PCBUs) to ensure the health and safety of their workers.

The purpose of the Amendment Regulation is to achieve consistency with the nationally agreed model WHS laws and in doing so, bring the Territory into line with the most contemporary approaches to the regulation of hazardous chemicals in the workplace.

Under the amendments, the Territory will adopt a new methodology for the classification, labelling and packaging of hazardous chemicals, namely the *Globally Harmonised System for the Classification and Labelling of Hazardous Chemicals* (GHS).

Moving to the GHS will benefit the ACT particularly given its proximity with NSW where the GHS has been in place since 1 January 2017. It is an internationally agreed system for classifying and labelling hazardous chemicals. As such, using the GHS in the Territory provides PCBUs that use, handle and store hazardous chemicals with a universal, practical, reliable and easy to understand system to identify the hazards associated with particular chemicals. This will assist PCBUs and workers in using the most appropriate preventative and protective measures to ensure health and safety in the workplace.

*The nature and extent of the limitation*

The strict liability offences created under the Amendment Regulation are consistent with the existing application of strict liability to the physical elements of offences under the WHS legislative framework. Specifically, section 6A of the WHS Regulation which expressly states that under the WHS Regulation strict liability applies to each physical element of an offence. This use of strict liability offences is also consistent with the broader WHS legislative framework under section 12A of the WHS Act.

Under the Amendment Regulation, a number of specific safety duties are imposed on a range of different persons including manufacturers, importers, suppliers and PCBUs who use, store or handle hazardous chemicals as well as owners, builders and operators of certain pipelines. These safety duties include responsibilities with respect to the classification, packing and labelling, safety data sheets and disclosure of chemical identities, warning placards and safety signage, as well as the keeping of hazardous chemicals registers and manifests, control of risks and supervision of workers.

In addition, all PCBUs are required to provide health monitoring to workers who work with certain hazardous chemicals. In addition, more onerous safety duties are applied under chapter 9 in relation to major hazard facilities where large volumes of hazardous chemicals are used, stored or handled with additional safety and case management systems, and hazard identification and risk control measures.

Strict liability is applied to all offences for breaching any of the safety duties applied under chapter 7 and chapter 9 in the course of using, handling or storing hazardous chemicals. As indicated above, a person accused of a strict liability offence created under the Amendment Regulation has the defences normally available under the *Criminal Code 2002*, for example mistake of fact. In addition and consistent with the application of offences under the WHS Regulation, none of the new offences impose a custodial penalty.

*The relationship between the limitation and its purpose*

As is the case with all strict liability offences, they are limited to circumstances where hazardous chemicals are being used, stored or handled. They are therefore directly relevant to the purpose of the WHS legislative framework in ensuring the health and safety of workers in the workplace.

*Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve*

The limitation under the Amendment Regulation in relation to strict liability offences is considered to be the least restrictive means of ensuring that there are effective means of ensuring the health and safety of workers by deterring non-compliance with the safety duties imposed under chapter 7 and chapter 9 of the WHS Regulation. While the inclusion of strict liability limits the range of defences that may be available to persons accused of those offences, they are directly relevant to the important public safety purpose of ensuring the risks and hazards of working with hazardous chemicals are minimised or eliminated as far as possible.